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IN THE

Supreme Court of the United States

No. ..... October Term, 1975 75-541

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

JOHN McDADE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of The United States:

Petitioner, the Commonwealth of Pennsylvania, by its Attorneys, JOHN J. HICKTON, District Attorney of Allegheny County, Pennsylvania, and ROBERT L. EBERHARDT, Assistant District Attorney, respectfully prays that a Writ of Certiorari issue to review the Opinion of the Supreme Court of Pennsylvania entered in this proceeding on July 7, 1975, relating to the Respondent, John McDade.

Pursuant to Rule 23 of this Honorable Court, your Petitioner respectfully represents as follows:

Opinions Below

COMMONWEALTH v. McDADE

The Opinion of the Court of Common Pleas of Allegheny County appears in Appendix "A" hereto.

The Opinion and dissenting Opinion of the Pennsylvania Supreme Court, *Commonwealth v. McDade*, ... Pa. ....., ... A.2d .... (1975) appears in Appendix "B" hereto.

Statement of Jurisdiction

The Opinion of the Supreme Court of Pennsylvania was entered on July 7, 1975, and this Petition was filed within ninety (90) days of that date. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257(3).

Statement of Question Involved

Whether the Pennsylvania Supreme Court erred in applying the "fruit of the poisonous tree" doctrine, as the voluntary nature of the subsequent statement given to the Respondent's friends while no police were present was sufficient to purge the taint of the original questioning?

Constitutional Provisions Involved

The Fifth Amendment to the Constitution of the United States in pertinent part provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself"

The Fourteenth Amendment to the Constitution of the United States in pertinent part provides:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

Statement of the Case

Respondent was indicted at No. 4039A May Sessions, 1973 on a bill charging counts of Murder, Voluntary Manslaughter, and Involuntary Manslaughter. On January 21, 1974, a hearing was held on the Respondent's oral application to suppress any and all statements, written or oral, made by the Respondent. Respondent was represented by counsel of the Public Defender's Office of Allegheny County, Pennsylvania. On January 22, 1974 the Honorable James F. Clarke entered an Order granting the Respondent's Application to Suppress.

On January 24, 1974, the Commonwealth of Pennsylvania filed an appeal with the Supreme Court of Pennsylvania, Western District, at No. 83 March Term, 1974, from the Order of the Court of Common Pleas of Allegheny County dated January 22, 1974. The appeal was presented to the Supreme Court of Pennsylvania at its Session at Pittsburgh, Pennsylvania during the month of September, 1974. On July 7, 1975, a majority of the Pennsylvania Supreme Court held that the "Fruit of the Poisonous Tree" Doctrine applied to the statements given by the Respondent voluntarily to two female friends during a requested conversation. In so doing, the Pennsylvania Supreme Court modified the Order of the Suppression Hearing Court by excluding from the lower court Order a statement given by the Respondent to a fellow-inmate. As so modified, the Order of the lower court was affirmed. Mr. Justice Nix filed a dissenting opinion in which he indicated that a direct causal connection between the Respondent's initial statement and Respondent's statements to his female friends was not established. The majority and dissenting opinions of the Pennsylvania Supreme Court are attached hereto as Exhibit "B".

The facts surrounding the Respondent's arrest and his giving of various statements can be adequately summarized as follows:

On June 8, 1972, the body of Joseph Wells, age 14 years, was found lying in a creek in Harrison Township, Allegheny County, Pennsylvania. The deceased had his hands wired behind his back and had been shot three (3) times. Local police and Allegheny County detectives immediately launched an intensive investigation. During that investigation, the name of John McDade was mentioned as being possibly the person last to have seen Joseph Wells alive.

On July 13, 1972, Allegheny County Detective Joseph Start briefly interviewed Respondent at the Tarentum Borough Jail where he was being held on an unrelated summary conviction awaiting transfer to the Allegheny County Jail to serve time for failure to pay a fine (T. 55).

The following day, Friday July 14, 1972, Respondent was transferred to Allegheny County Jail (T. 53). At approximately 10:30 A.M., Allegheny County detectives removed him from the Allegheny County Jail and he was taken by them to the Fourth Floor of the Courthouse and was subjected to an interview and interrogation for a period of approximately eight and one-half hours or until 7:00 P.M. of that day at which time he was returned to the County Jail. During this period, he was interviewed by detectives, had lunch, was administered a polygraph test, and was taken to the White Tower Restaurant for supper (Judge's finding of fact No. 7).

Two days later on Monday, July 17, 1972 at approximately 10:30 A.M., Allegheny County detectives again removed Respondent from the County Jail and took him first to the Detective Bureau Headquarters in the Courthouse and ultimately by automobile to the Millvale Borough Municipal Building for questioning (T. 59). At about 12:00 noon, after having arrived at the Millvale Borough Police Station, Respondent was informed of his constitutional rights, given his constitutional warnings, and he executed a valid waiver in writing at that time (Judge's finding of fact No. 10). This period of police custodial interrogation continued for approximately sixteen hours or until 2:50 A.M. the following morning, July 18, 1972. During this time, Respondent made several incriminating statements to police officers, finally culminating in a seven-page typewritten confession and a two-page supplement to that confession which was signed by Respondent. Respondent was then returned to the County Jail.

About nine hours later, at noon on July 18, 1972, Respondent was taken by Captain Start and Detective Finello to the New Kensington home of two women-friends of his: one Jody Delacroix and Jerry Weir, and during the visit to these friends while out of earshot of the police officers he made certain incriminating statements to them. These two women were close friends of Respondent (T. 84),[1] and he indicated that they could give the correct name of a person who had supplied him with the weapon which he used to commit the murder. He also indicated that he wished to see them on a personal matter (T. 85). The visit was made to their apartment at the request of Respondent and because he wanted to "sit down and talk with them and tell them about this charge that was then pending against him" (T. 85).

While police officers remained in the living room of the apartment, Respondent and his friend Jody requested permission to talk alone and were permitted to go to another room for a period of fifteen to twenty minutes (T. 87). Jerry intermittently went into the other room during that period. It was during this period of time, out of earshot of the police officers, that the incriminating statements were made by Respondent to his friends. After Respondent's visit to his friends was concluded, Respondent was then taken by police officers to several places near the scene of the crime and was finally returned to the Allegheny County Detective Bureau and thence to the jail at approximately 2:00 A.M. on July 19, 1972.

The trial court issued a blanket suppression order as to all statements made by Respondent. Petitioner appealed to the Supreme Court of Pennsylvania alleging that the statements to the girls were not obtained by police questioning, and should not have been suppressed. The Court held, *inter alia*, that

[1] Numerals in parentheses preceded by the letter "T" refer to the pages of the Hearing Transcript.

Petitioner failed to prove the statement to the girls was purged of the taint of the original illegal questioning.

ARGUMENT

REASON FOR ALLOWANCE OF WRIT

I. The Pennsylvania Supreme Court erred in applying the "Fruit of the Poisonous Tree Doctrine", as the voluntary nature of the subsequent statement given to Respondent's friends while no police were present was sufficient to purge the taint of the original questioning.

The question presented by Petitioner involves the Pennsylvania Supreme Court's application of the "Fruit of the Poisonous Tree" Doctrine. As stated by your Honorable Court the test to be applied is:

> . . . whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.
>
> *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

Petitioner has consistently conceded that the statements given directly to the police, following custodial interrogation without *Miranda* warnings, must be excluded. The statements were clearly obtained by exploiting the original questioning.

The statement given by Respondent to his friends is another matter. Petitioner contends that the statement was voluntarily given, and as such, an independent act of the Respondent's free will. *Wong Sun v. United States, supra*, at 486. Respondent was taken to the friends' house at his own request. No police were present during the discussion between the girls and

Respondent. The record is simply void of any evidence of police exploitation.

This problem has arisen because the trial court failed to make a specific finding of fact on this point. As a result, the Pennsylvania Supreme Court was required to act as the fact finder, with the majority and dissent having opposing views. Your Petitioner submits that the Dissenting Opinion by Mr. Justice Nix more adequately reflects the true record.

If Petitioner is correct on the lack of police exploitation, exclusion is improper. As stated by Mr. Chief Justice Burger, dissenting:

> The exclusionary rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence.
>
> *Bivens v. Six Unknown Agents*, 403 U.S. 388, 413 (1971).

There was no "exploitation" in allowing Respondent to discuss his situation with friends. The statement should be held to be constitutionally admissible.

Conclusion

The Commonwealth asserts that the failure of the Pennsylvania Supreme Court to recognize the controlling decisions of your Honorable Court in the instant situation was constitutionally infirm. For the reasons stated above, it is urged that the Petition be granted or, in the alternative, that the Pennsylvania Supreme Court be summarily reversed.

Respectfully submitted,

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Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County

OPINION

(Filed: February 26, 1974.)

CLARKE, *J.*

On or about June 8, 1972, in Allegheny County, Pennsylvania, the body of Joseph Wells was found under circumstances indicating his life had been taken by criminal means and defendant, John McDade, was eventually charged and indicted for the alleged homicide.

On Monday, January 21, 1974, a hearing was held on oral application of defendant's attorney to suppress any and all statements, written or oral, made by defendant. After hearing the suppression, court ruled in defendant's favor, ordering that any statement of defendant obtained on or after July 14, 1972, be suppressed.

REVIEW OF TESTIMONY

During the course of its investigation, the Homicide Division of the Allegheny County Detective Bureau, specifically Captain Joseph Start, saw and spoke to defendant while defendant was lodged in jail in the Borough of Tarentum Police Station on charges unrelated to the Wells' homicide. The encounter took place at 8:00 P.M. or 9:00 P.M. on Thursday, July 13, 1972, while defendant was inside the jail cell and Captain Start was outside the cell. Captain Start testified at a Suppression Hearing that at that time he did not suspect defendant as the perpetrator of the homicide, but that the interview was one of many made of a number of persons following the discovery of the body during the course of the early part of the investigation.

On cross-examination Captain Start said he learned from defendant during their initial talk at Tarentum Police Station

that defendant had seen Joseph Wells about 7:00 P.M. or 7:30 P.M. on the evening of what was thought to be the last day the victim was seen alive and that defendant might have been the "last one who had seen him."

The next day, Friday, July 14, 1972, defendant was brought from Tarentum jail to the County Detective Bureau, where Captain Start again interviewed him at 10:30 or 10:45 A.M., with a Detective Miller present who also interviewed defendant. Again at this time, Captain Start testified that he did not suspect defendant of the homicide. Defendant remained at the Detective Bureau and had lunch there, remaining until 4:30 P.M. Defendant was not free to leave the Bureau because he was to be committed to the County Jail on the unrelated summary charge which had led to his incarceration in Tarentum Police Station. He was to serve two weeks in the County Jail.

During the period time from 10:30 A.M. until 4:00 P.M. on July 14th, accounting for the time according to Captain Start, arrangements were made for defendant to be given a polygraph test, and he was interviewed by the two detectives. The polygraph test was administered by the Director of the Allegheny County Crime Laboratory sometime after 4:00 P.M., and defendant was taken to a White Tower restaurant for supper and then lodged in County Jail after 7:00 P.M.

Captain Start next saw defendant on Monday, July 17, 1972, obtaining a court order for his release from County Jail to be brought to the Detective Bureau again on the fourth floor of the Courthouse where he arrived about 10:30 A.M. Captain Start testified that up until this time defendant was not yet under suspicion nor was he arrested for the Wells' homicide, but that because of the presence of newsmen and television cameramen at the Detective Bureau, he directed

detectives Finello, Ringel and Miller to take defendant away from the Courthouse to question him at the Millvale Borough Police Station where there "would be more privacy" and then to take him to Fawn Township, the scene of the alleged homicide for defendant to point out the place where defendant had claimed he saw the victim alive shortly prior to discovery of the body.

On cross-examination, Captain Start said he had instructed the detectives to stop on the way out to Fawn Township, "and get the whole story from him out there at the Millvale Police Station . . ."

Captain Start then said he received a telephone call from one of the three detectives around noon that day, from the Millvale Police Station, reporting that defendant made an incriminating statement, after which Start next saw defendant at the homicide scene about 3:00 P.M. Defendant was then in the back seat of Detective Finello's car, crying, with his elbows on his knees and bent over with his head between clenched fists.

Captain Start spoke to defendant and asked him if he knew his "rights" and defendant said that he did and then told Captain Start information "implicating himself", and gave a statement relating "what happened there", and pointed to an area in a creek where "he threw the gun." At this point, Fawn Township Police Officer Durochia, also at the scene, said he had known defendant for some time and received Start's permission to talk with defendant.

After some time, all of the officers and the defendant went to the Fawn Township Municipal Building. Defendant asked to see his mother. Defendant's mother and sister were brought to the Municipal Building about 9:00 P.M. where the three of

them talked for an hour, more or less, during which defendant made "inculpatory statements."

At 10:00 P.M. the officers and defendant left the Municipal Building to return to the Detective Bureau, stopping on the way for something to eat. At the Detective Bureau, Captain Start asked defendant "if he would care to make a statement concerning what he had told us and defendant indicated he would." That statement was marked as Commonwealth's Suppression Exhibit One, and was dated July 18, 1972, and timed at 12:26 A.M., taken in Captain Start's office in the Courthouse. During the course of interrogation which produced the statement, Captain Start advised defendant, "John, on Thursday, June 8, 1972, at approximately 7:20 P.M., the body of Joseph Wells, white male, age 14 of Sheldon Park, Natrona Heights in Harrison Township was lying in a creek off Howes Run Road, Fawn Township, Pennsylvania. He, the victim, Joseph Wells was fatally shot. You are now under arrest and charged with the murder of this fatal shooting. Do you clearly understand this?" This statement, Exhibit One, included a supplement, given at 2:50 A.M., to the original statement of two pages, there being nine pages altogether, typewritten, signed and initialed by defendant.

Then on Wednesday, July 19, 1972, "in the early hours," Captain Start received from defendant, in the Detective Bureau, a statement handwritten by defendant, consisting of four pages on yellow legal pad paper, single spaced, which was marked as Commonwealth's Exhibit Two. This handwritten statement was apparently given shortly after midnight on July 19, 1972, and came about as a result of information learned from the defendant's statement of the previous day. In the meantime, defendant was taken from County Jail to New Kensington, Westmoreland County, where he arrived at

1:00 P.M. at the home of two women friends of his, Jody Delecroix and Jerri Weir. He was taken there by Captain Start and Detective Finello.

Jody and defendant spoke privately for 15 or 20 minutes, during which defendant made to Jody what Captain Start said he later learned were "some inculpatory statements", which he then repeated in the presence of Start, Finello, Jody and Jerri, while seated in the bedroom.

Following this episode, on the basis of information learned during it, the officers and defendant went to the residence of one Johns, at R. D. No. 2, Saxonburg, and confiscated two .22 caliber rifles, one of which, defendant said, was "The one he used to shoot Joey Wells with."

On the way back to the Courthouse from Saxonburg, at defendant's request, Captain Start arranged for defendant to meet and talk with his brother and sister-in-law at a firehall in Fawn Township, at the end of which meeting Captain Start asked defendant's brother, "Has he told you what he did?" to which the brother replied, "Yes, but I don't believe it."

It was following this, upon arrival at the Detective Bureau in the Courthouse, when the handwritten statement, Exhibit No. Two was made by defendant.

Then Captain Start related an encounter with one Richard Jones in the County Jail on November 1, 1972, and received a statement from Jones which was said to have been made by defendant to Jones and to be of an inculpatory nature. And then again on January 18, 1973, Jones delivered to Start a letter or note which is said to incriminate defendant.

Captain Start related that he had informed defendant he was under arrest on July 18, 1972, but that defendant was not

arraigned on the charge of homicide of Joseph Wells until April 23, 1973, more than nine months later.

Detective Finello testified that he was assigned to remove defendant from County Jail to the Detective Bureau on July 17, 1972, from whence he, Detectives Ringel and Miller took defendant to Millvale Police Station, shortly before noon. In the car, on the way, Finello said there was "speaking, getting acquainted with the defendant," and whether or not defendant knew the victim, and that defendant had said, "he didn't like Joey Wells," and "that he hated him."

Upon arrival at Millvale Police Station, the group entered the Chief's Office and Detective Ringel "informed Mr. McDade of his rights". Then Finello left the room to have lunch and upon his return about 1:00 P.M. Detective Ringel informed him "that he received a confession," and that defendant was crying. Commonwealth's Suppression Exhibit No. 3 was marked and said by Finello to contain the "rights warnings" and a waiver of rights signed by defendant.

Finello said that after the confession at Millvale, Detective Ringel accused defendant of the killing, although his testimony as to whether or not defendant was then and there placed under arrest for the homicide was unclear, although Finello did acknowledge that defendant was still in custody for the summary offense for which he had been committed to Allegheny County Jail.

Fawn Township Police Officer Donald Durochia testified that he was engaged in a search of the area surrounding the place where the victim's body was found on July 17, 1972 and saw defendant arrive in a detective's car, about 3:00 or 4:00 P.M. Between six and seven o'clock P.M., Durochia took defendant from the car to the bank of the creek where the vic-

tim's body had been found and, "I asked him if he understood his rights, and if his rights had been given to him, and if they were, did he understand them, and he said he did." Then Durochia said defendant gave him a statement inculpating himself.

From a stipulation entered into by counsel and from the reading by the court into the record of data from the Complaint, it appears that Joseph J. Start signed a Complaint on April 23, 1973, charging John McDade with the murder of Joseph Wells and that preliminary arraignment was held before a Deputy Coroner the same day and that Coroner's Inquest was held on May 2, 1973.

The testimony of Dr. E. H. Davis, Director and Chief Psychiatrist of the Behavior Clinic, was taken on request of defendant's counsel. A written report of Doctor Davis, which was made available to defense counsel at the suppression hearing, was dated December 18, 1973. From this report it appears that defendant was examined by various staff members of the clinic in June and October, 1972, April, May and December of 1973. The report states that "defendant is a physically healthy 21 year old single white man who has never been insane or psychotic and is of low-average intelligence with a ninth grade education. He should be criminally responsible for his behavior and he most certainly has the capacity to be tried." Doctor Davis referred to the defendant as mendacious and emotionally unstable.

The defendant did not offer any testimony himself, nor any witness other than Doctor Davis.

FINDINGS OF FACT

1. Defendant, John McDade, is a competent 21 year old man of low-average intelligence with a ninth grade education.

2. On Thursday, June 8, 1972, at about 7:20 P.M., the body of Joseph Wells, white male age 14, of Sheldon Park, Natrona Heights, Harrison Township, Allegheny County, Pennsylvania, was found in a creek in Fawn Township, Allegheny County, Pennsylvania, dead as a result of gunshot wounds.

3. From June 8th to July 13, 1972, Allegheny County Detectives and local police conducted an investigation into the death of Joseph Wells (R. 49).

4. During the course of the investigation, Detective Captain Start heard the name of John McDade, defendant, mentioned, and that he was lodged in Tarentum Jail on a unrelated charge.

5. Captain Start interviewed defendant at about 9:00 P.M., July 13, 1972, the defendant being in custody in a cell at Tarentum Jail at the time, and no constitutional warnings were given, nor was defendant advised of his constitutional rights regarding silence and the right to counsel.

6. During the interview of July 13, 1972, Captain Start learned that defendant knew deceased and may have been among the last of persons to see Joseph Wells alive (R. 50, 52). (Defendant's Statement No. 1).

7. The next morning, July 14, 1972, defendant was transferred from Tarentum Jail to the Allegheny County Jail to serve a two week sentence on the unrelated charge of a summary offense, and at about 10:30 A.M. on July 14, 1972, was

removed from the County Jail in the custody of two County Detectives and taken to the office of Captain Start in the Detective Bureau on the fourth floor of the Courthouse, where he was questioned and interviewed by Captain Start and Detective Miller, without being given constitutional warnings nor advised of constitutional rights. Defendant remained in custody of the detectives on July 14, 1972, until he was returned to County Jail at about 7:00 P.M. During this approximately 8-1/2 hour period he was interviewed by the detectives, had lunch[1] in the Detective Bureau, was administered a polygraph test by the Crime Laboratory and was taken to a White Tower restaurant for supper (R. 56, 57). (Defendant's Statement No. 2).

8. At about 10:30 A.M. on July 17, 1972, defendant was again removed from County Jail by County Detectives and in their custody was brought again to the Detective Bureau in the Courthouse, but upon Captain Start's instructions there, he was taken by automobile in custody of three County Detectives to the Millvale Borough Municipal Building for questioning (R. 60).

9. En route to Millvale, in the detective's car, the defendant was asked questions concerning the victim (R. 121) to which he gave responses without as yet having been given constitutional warnings or informed of his constitutional rights.

10. At the Millvale Borough Building to which he was taken for questioning, defendant was informed of his constitutional rights and given constitutional warnings, which he waived in writing (Suppression Exhibit No. 1), at 12:00 Noon on July 17, 1972, and thereafter made an inculpatory statement to Detective Ringel (R. 124, 125). (Defendant's Statement No. 3).

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11. Three hours later at the scene of the alleged homicide, to where defendant was transported from Millvale, defendant made another inculpatory statement to Captain Start (R. 67). (Defendant's Statement No. 4).

12. Defendant and the detectives remained in the vicinity of the scene of the alleged homicide for about three hours and at 6:00 P.M. defendant made an incriminating statement to Fawn Township Officer Durosha (R. 145). (Defendant's Statement No. 5).

13. Several hours later, still on July 17, 1972, defendant was at the Fawn Township Municipal Building. At his request, the officers brought defendant's mother and sister to the Municipal Building where he was allowed to speak with them and was overheard by the officers making incriminating statements to them (R. 71, 146). (Defendant's Statement No. 6).

14. Defendant was transported from the Fawn Township Municipal Building in the detective's car and still in their custody to the Detective Bureau in the Courthouse, where at 12:26 A.M., July 18, 1972, he was reminded of his rights by Captain Start (R. 73), told he was under arrest for the Joseph Wells' homicide by Captain Start, and a seven page typewritten confession was signed by defendant (R. 72, *et seq.*). At 2:50 A.M. on July 18, 1972, this confession was supplemented by two additional typewritten pages signed by defendant (R. 81). (Defendant's Statement No. 7).

15. Defendant had been removed from County Jail by the County Detectives at 10:30 A.M. on July 17, 1972, and remained constantly in their custody until he was returned to County Jail sometime after 2:50 A.M. on July 18, 1972, following his signing a nine page typewritten confession, representing a period of about 16 hours.

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16. On July 18, 1972, about noon, or about nine hours after having signed the confession and having been returned to County Jail, defendant was taken by Captain Start and Detective Finello to the New Kensington home of two women friends, Jody Delacroix and Jerry Weir to whom he made incriminating statements (R. 87). (Defendant's Statement No. 8).

17. From New Kensington, defendant was taken by the detectives to a John's residence, Saxonburg, where two .22 caliber rifles were confiscated, one of which defendant said was the one he used to shoot Wells (R. 90).

18. From Saxonburg, defendant was taken to a firehall in Fawn Township where he was allowed to visit with his brother and from there to a farm area where a search was made for wire which was supposed to have been used to bind the victim's hands (R. 91), and then defendant was returned to the Detective Bureau in the Courthouse.

19. At 2:00 A.M. on July 19, 1972, defendant made a written confession in his own handwriting, consisting of four pages, signed by him and witnessed by the County Detectives; this confession being made in the Detective Bureau, about 14 hours after he had been removed from jail for the new Kensington visit, and defendant being in continuous custody of the detectives during that time (Defendant's Statement No. 9).

20. Defendant was released from County Jail on July 28, 1972, having served his time for conviction of a summary offense.

21. On November 1, 1972, Richard Jones, a prisioner in County Jail gave the detectives a report of an incident in which defendant, according to Jones, incriminated himself to the Wells killing (R. 94).

22. On April 23, 1973, defendant was formally charged with the murder of Wells, Captain Start being the affiant on the complaint, whereupon he was arrested and preliminarily arraigned the same day, and on May 2, 1973, held for court on a charge of murder following Coroner's inquest.

23. Defendant was continuously in custody from July 13, 1972 until July 28, 1972, and was advised of his rights for the first time at 12:00 Noon on July 17, 1972 at Millvale Station.

24. Defendant was placed under arrest by Captain Start at about 12:30 A.M. on July 18, 1972, but was not arraigned until April 23, 1973, more than nine months later.

CONCLUSIONS.

Although defendant was not in custody in the Tarentum Jail as a result of any suspicion of or charges of the Wells' homicide on July 14, 1972, he was, in fact, in custody. McDade was in a jail cell and Start spoke to him through the bars from outside the cell. McDade's name had come to Captain Start's attention during his investigation of the homicide and he went to the Tarentum Jail specifically to question defendant about the case, although Start disclaimed that he had any suspicion of McDade at that time. In these circumstances it appeared to the court from all of the circumstances that defendant should have been given the MIRANDA warnings prior to the interview. McDade's name was known to Start as a result of his investigation and Start went to Tarentum Jail specifically to ask him about Wells and the shooting. In *Mathis v. United States*, 391 U.S. 1, 88 S. Ct. 1503 (1968), an Internal Revenue agent failed to give the defendant the Miranda warnings when questioning him about his prior income tax returns while petitioner was incarcerated in a state

jail serving a state sentence. The prosecution maintained that Miranda was not applicable because, (1) the questioning was part of a "routine tax investigation" and (2) defendant had been jailed by the interrogating officers but was there for an entirely different offense. The Supreme Court of the United States declared these "differences . . . too minor and shadowy to justify a departure from the well-considered conclusion of Miranda with references to warnings to be given to a person held in custody." Start's interview with McDade in the Tarentum Jail was custodial interrogation, and the omission of Miranda warnings renders inadmissible any information obtained on that occasion.

> "The admissibility of the instant confession is controlled by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). There the United States Supreme Court held: 'To summarize we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. . . . He must be warned *prior to any questioning* that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of any attorney, and that if he cannot afford an attorney, one will be appointed for him *prior to any questioning* if he so desires. Opportunity to exercise these rights must be afforded him *throughout* the interrogation . . . (emphasis added)." *Com. v. Ware*, 438 Pa. at 519, 520 (1970).

In footnote 3 on page 520 of *Com. v. Ware, supra*, the Court says:

> "The requirement that warnings be given before interrogation begins was emphasized throughout *Miranda*.

E.g.: '(I)f a person is to be subjected to interrogation, he must *first* be informed in clear and unequivocal terms that he has a right to remain silent.' 384 U.S. at 467-68, 86 S.Ct. at 1624 (emphasis added). 'The principles announced today deal with the protection which must be given to this privilege against self-incrimination when the individual is *first* subjected to police interrogation. . . . It is at this point that our adversary system of criminal proceedings commences . . .' 384 U.S. at 477, 86 S.Ct. at 1629 (emphasis added)."

On the matter of whether defendant was interrogated initially as a suspect or not, and whether or not warnings were required at Tarentum Jail and the Detective Bureau the next day, the physical aspects of almost daily interrogation for long hours is significant. One session lead to another and eventually a confession was obtained.

"The Commonwealth argues that up to the moment Banks first admitted this participation in the crime, he was merely being questioned 'as a witness' to a crime and it was unnecessary to advise him of his right to remain silent so long as this role continued. With this we cannot agree. The appellation given the individual questioned is not controlling. Otherwise the police could evade the procedural safeguards required by *Escobedo, supra,* and *Miranda, supra,* to protect one's privilege against self-incrimination as 'a witness'. If questioning is initiated and pursued during custodial interrogation, proper warning of constitutional rights is first required, *Miranda v. Arizona, supra.* While the courts of other jurisdictions have experienced difficulty in determining whether questioning under certain circumstances constitutes 'custodial interrogation,' there is universal agreement

that if the police questioning occurs under an atmosphere or circumstances which leave the individual no freedom or choice and which are inherently coercive, this is 'custodial interrogation' . . ." *Com. v. Banks,* 429 Pa. 53, 58, 59 (1968).

The court believes that the initial taint or defect in the method of obtaining information from the defendant by the County Detectives was perpetuated in the experience of the defendant on July 14, 1972, when he was interviewed in the Detective Bureau and given a polygraph test, without any indication in the record of Miranda warnings having been given. On this occasion defendant was taken from County Jail and kept in the Detectives' custody for more than eight hours. This had all the appearance of serious and searching questioning, even if not continuously for the eight hour period, and considering the experience of the interrogation, the previous evening at Tarentum Jail, and defendant's custodial status, he should have been given constitutional warnings.

The first occasion in the record where it appears defendant was appropriately warned was at 12:00 Noon on July 17, 1972, at Millvale Police Station, at the time defendant made a confession to Detective Ringle. The court feels that the initial taint of failure to warn at Tarentum on July 13, 1972 and at the Detective Bureau on July 14, 1972, so permeated defendant's status that it was not removed by the rights warning given at Millvale, and that his confession there and subsequent statements were rendered inadmissible.

"The final question is whether or not the recorded statement admitted in evidence secured after Banks was advised of his right to remain silent was purged of the original illegality. We conclude not . . . 'a statement or

confession made subsequent to another confession of incriminating admission obtained absent a required warning of constitutional rights may not be used as evidence, unless it is first established that the last statement or confession was not the exploitation of the original illegality and was obtained under circumstances sufficiently distinguishing to purge it of the original taint.' " *Com. v. Banks*, 429 Pa. 53, at pp. 58, 59 (1968). See also *Com. v. Burdner*, 432 Pa. 405 (1968).

While there may be an arguable issue that defendant was placed under arrest by Detectives Ringle and Finello at Millvale Police Station, it appears uncontradicted that Captain Start placed defendant under arrest shortly after midnight on July 18, 1972, in the Detective Bureau at the Courthouse, and accused him of fatally shooting Joseph Wells. It is also uncontradicted that defendant was not arraigned on this charge until April 23, 1973. The delay during an interval of nine months plus five days between arrest and arraignment was not justified by the Commonwealth and therefore all evidence obtained during the period of unnecessary delay, having a reasonable relationship to the delay, must be excluded. *Com. v. Futch*, 447 Pa. 389 (1972); *Com. v. Dutton*, 453 Pa. 547 (1973); *Com. v. Wayman*, 454 Pa. 79 (1973). *Pa. R. Crim. Procedure 130.*

THEREFORE, the suppression court is of the opinion that any evidence obtained from the time of arrest on July 18, 1972 until arraignment on April 23, 1973, is inadmissible under Rule 130, and furthermore, because of failure to give adequate and appropriate constitutional warnings at the outset, all statements made by defendant are inadmissible.

JAMES F. CLARKE.

Appendix "B"—Opinion of the Pennsylvania Supreme Court

[J. 338]

IN THE SUPREME COURT OF PENNSYLVANIA

Western District

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

JOHN McDADE.

No. 83 March Term, 1974

Appeal from the Order of the Court of Common Pleas of Allegheny County, at No. 4039A, May Sessions, 1973

OPINION OF THE COURT

POMEROY, *J.*, Filed: July 7, 1975

The Commonwealth has appealed from an order of the trial court suppressing certain incriminating statements made by John McDade, the appellee, in connection with the homicide of one Joey Wells.[1] The trial court, after a hearing on ap-

[1] It is clear from the record that the suppression of the challenged evidence will handicap the Commonwealth in its prosecution of the case. It is for that reason that the Commonwealth has the right to appeal from the suppression order. *Commonwealth v. Wormsley*, ... Pa. ....., n.1, ... A.2d ....., n.1 (1975); *Commonwealth v. Bosurgi*, 411 Pa. 56, 190 A.2d 304 (1063).

pellee's oral motion to suppress,[2] issued a blanket order suppressing all statements made by the defendant because he had not been advised of his constitutional rights as mandated by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), prior to his initial interview by the police concerning the Wells slaying; and suppressing all evidence obtained during the period between defendant's arrest and arraignment for the additional reason that that evidence was the product of an unnecessary delay in violation of Rule 118 of the Pennsylvania Rules of Criminal Procedure, and hence inadmissible under *Commonwealth v. Futch*, 447 Pa. 389, 290 A.2d 417 (1972).

The Commonwealth complains only of the suppression of two of the incriminating declarations: (1) a statement made by the defendant to two women friends; and (2) a statement made by the defendant to a fellow-inmate while he was incarcerated on an unrelated charge. For the reasons hereinafter stated, we conclude that the order was correct except insofar as it suppressed the statement made to the fellow-inmate. We will therefore affirm with an appropriate modification.

A review of the facts surrounding the giving of these statements is necessary. On June 8, 1972 the body of 14 year old Joey Wells was discovered lying in a creek in Fawn Township,

[2] It is to be noted that the oral motion to suppress did not comply with the requirements of Pa. R. Cr. P., Rule 304 and Rule 323, 19 P.S. Appendix (Supp. 1974-75). Cf. *Commonwealth v. Turra*, 442 Pa. 192, 275 A.2d 96 (1971). The court apparently permitted the defendant to proceed on the basis of an oral motion to suppress because the court was aware of the fact that the defendant was represented by new counsel, and that previous counsel had prepared a written motion which had become misplaced before it could be filed.

At the suppression hearing, the prosecutor objected to the motion on the ground that it was untimely, but neither that objection nor any other objection to the procedures employed below has been pursued on appeal.

Allegheny County. The deceased's hands were wired behind his back and there were indications that he had been shot three times. During the subsequent police investigation it was learned that John McDade may have been the last person to have seen Joey Wells alive. McDade was first interviewed concerning the Wells homicide on July 13, 1972. At that time he was not suspected as being involved in the crime; no *Miranda* warnings were given to him, and no inculpatory statements were made. The next day the defendant was transferred from the police station at the Borough of Tarentum to the Allegheny County Jail to commence serving a two-week sentence on a summary conviction for an unrelated offense. On the same day he was taken by county detectives to the Detective Bureau, where he remained in custody of the detectives for approximately eight and one-half hours.[3]

Three days later, July 17, 1972, McDade was again interrogated. By this time he had become the focus of the investigation, and the questioning was preceded by the giving, apparently for the first time, of warnings concerning his constitutional rights, which were waived in writing. From noon until midnight of that day, the defendant was questioned intermittently, first at the Millvale police station,[4] then at the scene of the discovery of Wells' body, again at the nearby Fawn Township Municipal Building where he was allowed to talk for about an hour with his mother and sister, and finally

[3] During this time McDade was interviewed by the detectives, had lunch in the Detective Bureau, was administered a polygraph test, and was taken to a restaurant for supper. It does not appear that any incriminating statements were made during this period.

[4] This interview took place at the Municipal Building of the Borough of Millvale, near Pittsburgh, in order to avoid numerous newsmen who were present at the Allegheny County Detective Bureau, where such interviews normally are held.

at the Allegheny County Detective Bureau. During this period, McDade made various incriminating statements to the police, culminating in a seven-page written confession obtained after his return to the Detective Bureau. The taking of this formal statement began at 12:26 A.M., July 18, 1973, prior to which the defendant was again advised of his constitutional rights, which he again waived. He then was told by one of the officers that he was under arrest for the Wells slaying.

At about noon on July 18, 1972, McDade was taken by the police, at his own request, to the New Kensington, Pennsylvania home of two women friends for the purpose of discussing the homicide with them. The defendant was permitted to converse with the women in a room out of earshot of the police. After this conversation one of the women then told the police that McDade wished to change his story, but that he was afraid that the policy would "be angry with him because he told you a lie with regard to the gun." Upon being assured that the police would not be angry, the woman requested McDade to repeat to the police the story he had told her and her friend. This he proceeded to do. He was not advised of his constitutional rights before reciting this altered version of his story.

The detectives and the defendant then proceeded to Saxonburg, Pennsylvania, where McDade had indicated in his altered story that the gun he had used in the slaying might be found. A weapon was found, but, as it turned out later, it was not the gun used in the Wells murder. Upon returning to the Allegheny County Detective Bureau early on July 19, 1972, McDade made a supplementary written statement to reflect the changes in his earlier narrative.

Notwithstanding these various inculpatory statements, the police did not then formally charge McDade with the Wells murder because they believed they lacked sufficient corroborating evidence for a successful prosecution. Accordingly, on July 28, 1972, after having served his fortnight's sentence on the unrelated summary offense, McDade was released from the Allegheny County Jail and allowed to go free. Three months later, on November 1, 1972, while serving time in jail on still another unrelated offense, the defendant again made an incriminating statement concerning the Joey Wells slaying, this one to a fellow-inmate. The statement was communicated to the police by the inmate by letter.

As noted at the beginning of this opinion, the hearing judge suppressed all statements made by the defendant on the ground that he had not been properly advised of his constitutional rights at the outset of his interrogation by the police on July 13, 1972. The court believed that the taint thus created "so permeated defendant's status it was not removed by the [subsequent] rights warning."

In *Commonweaith v. Moody*, 429 Pa. 39, 239 A.2d 409 (1968), we pointed out that "[a] confession secured after the person involved has been adequately advised of his constitutional rights is not rendered inadmissible *ipso facto* because an earlier confession or inculpatory admission was made in the absence of a warning of these rights, *Evans v. U. S.*, 375 F.2d 355 (8th Cir. 1967); *U. S. v. Hickey*, 247 F. Supp. 621 (E.D. Pa. 1965)." 429 Pa. at 44. See also *Commonwealth v. Frazier*, 443 Pa. 178, 279 A.2d 33 (1971). However, we have said that in order for evidence of a subsequent incriminating statement to be admissible, it must be "first established that the last statement or confession was not the exploitation of the original illegality and was obtained under circumstances

sufficiently distinguishing to purge it of the original taint." *Commonwealth v. Banks*, 429 Pa. 53, 59, 239 A.2d 416 (1968). See also *Wong Sun v. U. S.*, 371 U.S. 471, 9 L.Ed. 2d 441 (1963).

The Commonwealth has chosen not to contest the suppression of the formal written statement which McDade gave in the early morning of July 18, 1972, which preceded by approximately nine hours the statement to the women. We thus must accept as a premise the decision of the suppression court that the formal statement was vitiated by the inital failure of the police to give *Miranda* warnings on July 13. Although we do not have that particular statement before us, it apparently was of a seriously inculpatory nature. As such it formed an additional link in the chain of causality leading from the intial failure to inform appellant of his *Miranda* rights to his eventual admissions to his friends. See *Commonwealth v. Whitaker*, ... Pa. ....., ... A.2d .... (1975).

The Commonwealth urges that the statements to the women were voluntarily made in a non-custodial setting to persons unconnected with the police. Such factors, if truly present, would of course go a long way to dissipate any taint of previous illegality. Under the facts of this case, however, we cannot agree that these factors were established. The apparently damaging nature of McDade's formal statement to the police understandably created a compulsion upon him to "come clean" by giving the correct details about disposition of the murder weapon. Realistically viewed in light of the surrounding circumstances, the statement to the women, repeated to the police, was in the nature of a mere amendment to the previous invalid statement which appellant, apparently out of fear, chose to transmit through an intermediary rather than directly. The detectives were aware that McDade's pur-

pose in requesting to see the two women was to discuss the homicide with them, and that conversation took place with police permission while they waited in the next room. Although this episode occurred outside of a police station, McDade was at all times in police custody and was under observation even during the conversation. We thus conclude that the Commonwealth did not sustain its burden of proving that the statement to the women was purged of the taint of the prior illegal statement; hence the new statement was properly suppressed. *In Re Betrand*, 451 Pa. 381, 303 A.2d 486 (1973).

A different situation is presented in regard to the later incriminating statement given by the defendant to his fellow-inmate on November 1, 1972. This took place three months after his release from custody and without police intervention of any sort. A statement obtained under such circumstances cannot be said to be still affected either by the initial failure of the police to advise the defendant of his *Miranda* rights or by the subsequently obtained tainted statements. Cf. *Westover v. U. S.*, 384 U.S. 436, 496, 16 L.Ed.2d 694, 736 (1966); *U. S. v. Bayer*, 331 U.S. 532, 91 L.Ed. 654 (1947). In concluding to the contrary, we think that the suppression judge erred.

We must deal, finally, with the finding below that the November 1 statement was the product of an unnecessary delay between the time of the defendant's arrest and arraignment. The suppression court found as a fact that the defendant was arrested at approximately 12:30 A.M. on July 18, 1972 when he was told by an interrogating detective that he was under arrest. The preliminary arraignment did not come about until April 23, 1973, more than nine months later. Based on these facts the court concluded, in light of the exclusionary rule announced in *Commonwealth v. Futch, supra*, that all evidence obtained before the arraignment, including

the statement made to the fellow-inmate, must be suppressed as the product of that delay.

In our view, the court misperceived which arrest was the ciritical one for purposes of Rule 118 of the Rules of criminal Procedure, and hence also for the application of *Commonwealth v. Futch*. The arrest the court found to have taken place on July 18, 1972 was negated or rescinded when the police, after consultation with the district attorney's office, decided to forego prosecution of the defendant at that time due to the absence of corroborating evidence, as noted above. It was for that reason that the appellee was neither arraigned nor otherwise administratively processed in connection with the Wells slaying, but instead was released upon the conclusion of his sentence on the summary conviction. At that point he was no longer in police custody and he remained at liberty until his arrest on another unrelated offense. It was during his incarceration on that offense that the statement was made to the fellow-inmate. McDade was not rearrested for the Wells slaying until April 23, 1973 and on that same day was preliminarily arraigned. For Rule 118 and *Futch* purposes, the critical time was that between his arrest and arraignment on that date. Because the statement to the fellow-inmate was not made during that period, there was no basis for suppressing it on the ground of unnecessary delay.

The order of the suppression court is modified so as to exclude from its operation the statement of the appellee to his fellow-inmate on November 1, 1972. As so modified, the order is affirmed.

Mr. Justice NIX filed a dissenting opinion.

Mr. Chief Justice JONES did not participate in the consideration or decision of this case.

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IN THE SUPREME COURT OF PENNSYLVANIA

Western District

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

JOHN McDADE.

No. 83 March Term, 1974

Appeal from the Order of the Court of Common Pleas of Allegheny County, at No. 4039A May Session, 1973

DISSENTING OPINION

NIX, *J.*

Filed: July 7, 1975

I agree with the majority opinion reversing the suppression of appellee's statement to his fellow inmate. However, I believe that it was also improper to suppress the statements made to appellee's two women friends. The majority concludes that because the statements given to the women were "in the nature of amendment[s] to [the] previous [inadmissible] statement ... there was a 'real and direct causal connection' between the two." Moreover the majority

finds that the statement to the women was tainted by the initial statement because appellee felt a "compulsion" to "come clean."

In my view the statements to the women were totally voluntary and independent of the initial illegality and the exclusionary rule to curb improper police conduct should not be applied to these statements.

First it is important to note that this is not a case where the friends to whom the statements were made were acting on behalf of the police, compare *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964). Indeed in this case appellee requested that he be taken to see the women. He talked with them alone and the statements made to them were totally voluntary. Clearly if a defendant, in custody, makes statements which are not the result of initiated interrogation, those statements are admissible. See *United States v. Mattson*, 469 F.2d 1234, 1237 (9th Cir. 1972); *United States v. Henderson*, 469 F.2d 1074, 1075 (5th Cir. 1972) cert denied 410 U.S. 985 (1973); 62 Georgetown L.J. (1973).

Furthermore the majority has failed to adequately establish a direct causal connection between appellee's initial statement and his statements to the women. The majority relies heavily on the fact that appellee felt compelled to use the women as intermediaries in order to "come clean" regarding misstatements in his initial statement. On the contrary the record reflects that appellee wished to speak to these women not because of the earlier statement, but rather because he wished to obtain advice and guidance concerning his predicament at that time. There is no evidence that he wished to tell the truth (*i.e.* "come clean") at the time he voluntarily initiated the conversation with the women or that he was coerced by the police to speak to the women. It was only after this conversation occurred that the police were told that he wished to be candid and to correct certain misstatements in his prior statement to them.

In *Commonwealth v. Greene*, 456 Pa. 195, ... A.2d .... (1974) the writer of the majority opinion in the instant appeal wrote:

> ". . . appellant's second statement was made after a time lapse of one and one half hours, in a different physical setting, to a different police officer; factors which we have recognized as significant in cleansing any taint from an earlier statement." *Id* at 198, ... A.2d .... citing *Commonwealth v. Mitchell*, 445 Pa. 461, 285 A.2d 93 (1971).

Here the evidence reveals that the statements were made voluntarily at the home of two friends; that the statements were made only to these friends who were not agents of, nor employed by the police; and that the statements were made at least nine hours after the inadmissible statements to the police. Moreover there is no evidence that there was any police coercion before the statements were made; nor is there evidence that when appellee made the statements to these women he was motivated to do so by the initial statement to the police. Indeed the desire to correct former misstatements and be candid after meeting with these friends further suggests that his motive in speaking with them was solely to obtain advice and counsel.

Under these facts I find no basis for applying an exculsionary rule designed to deter illegal police conduct. Accordingly I dissent from that portion of the majority opinion which upholds the suppression of the statements to the two women.